

Introduction

Creative Commons licences (also referred to as CC licences) permit the copying, reuse, distribution, and in some cases, modification of the original owner's creative work without having to obtain permission every single time from the rights holder. The CC licence is associated with a broad movement looking for a re-balancing of intellectual property rights legislation.

The purpose of this briefing paper is to provide JISC-funded projects, as well as content creators and others within higher (HE) and further education (FE) institutions, with information that can be used to make judgements as to when the use of open content licences, particularly CC licences, may be appropriate.

Although the lines between teaching, learning and research are becoming increasingly blurred, examples of such usage might be:

- The creation of open educational resources
- The creation of e-learning materials by staff
- The submission of student-created materials, and
- The output from research work (both data and text)

In addition, institutions need to know when external CC licensed materials are to be used as part of their own learning materials and the limitations on the use of such materials.

This document focuses on CC licences although there are other open content licence models including Creative Archives and AEShareNet, which have comparable characteristics.

Open Content Licences Generally

Open content licensing is a way for the author or rights holder of a copyright work to grant a wide range of permission for use and reuse of their work via a non-transactional copyright licence, while retaining a relatively small set of rights. In other

words, permission is pre-granted to the user, without requiring the user to request permission every time they wish to use the work. This style of licensing, like any other, can usually only be used on works by someone who owns the copyright in the work or otherwise has permission to do so. Those who create works can use the licences to protect their works while encouraging certain uses of them.

Creative Commons

Creative Commons (www.creativecommons.org) is a licensing system under which authors or producers of a work offer some of their rights to others to reuse their work under certain specified conditions.

The licence is attached to the content and is available in various forms allowing the rights holder to retain a level of control over how their work is treated.

CC licences have various advantages, including ease of use, widespread adoption, choice and flexibility, human-readable, machine-readable and symbolic representations of the licences, and a direct link between the resource and its licence.

Nuts and Bolts

CC licences are free to use, as well as subsequently permitting free use of works under which they are issued. They also allow authors, scientists, artists, educators and other creators to grant permission easily for use of their works, by using user-friendly symbols. A simple digest of terms and conditions enables users to recognise the types of usage the rights owner is inviting them to undertake.

CC licences allow rights holders to maintain a basic level of control by offering something between an 'all rights reserved' copyright licence and waiving all of their rights.

The main CC licences offer a series of 'baseline rights' together with four 'licence elements' that can be mixed and matched to produce a licence through a point-and-click web interface:

- Attribution (BY) – you must credit the licensor of the work
- Non-Commercial (NC) – you can only use the work for non-commercial purposes
- No-Derivatives (ND) – you may not create adaptations of the work
- Share Alike (SA) – you may create adaptations of the work, but these must be under the same licence as this work

Credits and Disclaimer

This guidance has been prepared with assistance from JISC Legal, based upon a report examining the use of Creative Commons licences across HE and FE managed by the JISC IPR Consultancy. Its contents are for information purposes only and are not, nor are intended to be, legal advice. This information is not intended to constitute, and receipt of it does not constitute, a contract for legal advice or the establishment of a solicitor-client relationship.

Creative Commons Licences

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Attribution now forms a part of all current licences, thus these four elements form the six basic CC licences, with their common abbreviations in brackets:

- Attribution (BY)
- Attribution – No Derivatives (BY-ND)
- Attribution – Non-Commercial – No Derivatives (BY-NC-ND)
- Attribution – Non-Commercial (BY-NC)
- Attribution – Non-Commercial – Share Alike (BY-NC-SA)
- Attribution – Share Alike (BY-SA)

This generic set of CC licences only reflects the rules present in international treaties on copyright and related rights and not the actual law of the various jurisdictions. Jurisdiction-specific licences are available for Scotland and England and Wales. There is not a variant for Northern Ireland at present.

CC licences are normally attached to the digital content and authorise everyone who comes in contact with the work to use it in accordance with the terms of the licence.

This means that if one user has a copy of a Creative Commons-licensed work, that user can give a copy to a second user and the second user will be authorised to use the work consistent with the original CC licence. As a consequence of this the original rights owner has a licence agreement separately with both the first and second user. Further users are similarly able to use the work consistent with the terms of the licence.

Example

Creator A authors material, which she marks as licensed as Attribution – Non-Commercial (BY-NC). Author B can use all or parts of A's material to compile their own work so long as the use is non-commercial and is attributed. B must mark his own work as (BY-NC) (or at least the parts which came from Creator A). If Author C plans to use some of B's material that consists of Creator A's work then C's use is restricted to Attribution – Non-Commercial.

Recent developments in Creative Commons licensing have included the Creative Commons Plus¹ licence and the Creative Commons Zero² licence. The Creative Commons Plus Licence facilitates the add-on of an additional licence to the CC licence in order to facilitate the granting of more permissions by the content creator to the user, thus introducing greater flexibility to the type and range of permissions that are granted. Using the Creative Commons Zero licence creators are able to waive all copyrights and related or neighbouring interests that they may have over a work such as moral rights, publicity or privacy rights, rights protecting against unfair competition and any rights protecting the extraction, dissemination and reuse of data. Like all uses of CC licences, these permissions can only be granted if the creator holds the necessary rights for the work.

¹ <http://wiki.creativecommons.org/Ccplus>

² <http://labs.creativecommons.org/license/zero>

The Licence Agreement

The contractual status of CC licences differs by jurisdiction. In Scotland, CC licences are regarded as a contract³. In England and Wales, for a licence to have contractual force some form of consideration is normally necessary. Consideration 'may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other' (Currie v. Misa (1875) L. R. 10 Ex. 153, 162). The English and Welsh licence itself specifies that: 'the licensor grants you the rights contained here in consideration of your acceptance of such terms and conditions.'

(<http://creativecommons.org/licenses/by-nc/2.0/uk/legalcode>)

The text of the licence itself does not refer to contract law. A valid contract in English law requires an agreement (consisting of an offer and acceptance). Acceptance is usually established by the signing of an agreement. However, even without a signature, acceptance can be inferred by the conduct of the person who has been made the offer. So if that person carries out their side of the agreement then a valid acceptance can be implied and a contract is formed.

Whether the acceptance and consideration criteria are met in any particular case will depend upon the actions of the parties involved. If it is tested in court and it is determined that the conditions are not sufficient to have formed a valid contract, it is likely that the CC licence will be unenforceable.

A Policy Decision

Institutions need to be able to licence in both learning materials from outside as well as to control how their own materials are used more widely.

Sharing resources amongst similar institutions makes sense financially and there are many policy reasons to do so. Digital resources produced by publicly funded organisations are a valuable asset to the research and education community.

CC licences enable education institutions to release learning, teaching and research materials to the wider community. This attitude of creating and sharing knowledge resonates with the culture of the sector.

Academics/Researchers

How do 'Open Content' licences affect the existing intellectual property rights in staff produced work?

Academics tend to be very much in favour of people re-using their material. However, often it is not clear whether or not the institution, as their employer, owns the copyright in the work. Some academics see themselves as authors of teaching materials (rather than just users) because of the way content is created and courses are delivered. Academics may be covered by contracts that differ from other staff, eg e-learning advisers. If the institution has a policy of using CC licences for work produced

³ www.jonathanmitchell.info/cc/cc_sco_licence.html

What Your Institution Should Know

Some of the factors to be considered before deciding to implement CC licences for materials produced by staff and students.

The benefits and advantages of using CC licences

Simple legally

They are simplistic from a legal point of view – providing a quick solution to the complexities of content licensing by content creators and rights holders.

Example

Content creator Z can attach symbols to the electronic version of his work and those who access the content either on a website or in a virtual learning environment will know what rights they have to use the material.

Easy sharing and reuse of information and resources

The FE and HE sectors have a need to adapt and develop resources to meet different requirements from that intended by their original creators. The Creative Commons derivative work licence allows materials to be reused in this way.

Flexibility

CC licences are available in three formats, including machine-readable code, which can be processed by search engines, which is also useful for tracking licence usage.

Improved access

Digital resources produced by publicly funded organisations are a valuable asset to the research and education community. Many people in the FE and HE sectors believe that access to and use of these digital resources could be better and that the wider use of open content licences would help to improve the situation.

Administrative simplicity

One of the benefits of CC licences lies in their ability to be clearly and simply administered. CC licences are perceived as allowing some level of control, but without introducing a need to manage complex variants. The flexibility of the Creative Commons icons system enables individual works within a large collection to carry different licence terms. This avoids having to grant a licence for all items in a collection and means some components can be more freely used than those governed by more restrictive licences. This removes the need for lengthy negotiations by FE and HE institutions. Creative Commons are also non-transactional and so using content issued under a CC licence removes the requirement for requesting permission from the rights holders every time a work is used.

The case against

Uses and reuses

Institutions may wish to permit certain types of reuse of the licensed material but not necessarily all. Unfortunately the CC licences do not make such subtle distinctions. The nonderivative licences do permit incorporation of material into larger works, but once a licence grants derivative use there is no control over the reuse.

Third-party content

CC licences cannot be used to make material available for which third parties own the rights, unless they have explicitly granted permission for this use. Where there is unauthorised use of third-party content, such as images or personal data, this will usually invalidate the licences. Because of the viral nature of CC licence distribution, an institution in this situation may find it difficult or even impossible to withdraw this material if an infringement of this type has occurred and possibly face harsher penalties. These additional risks will need to be assessed and managed.

Uncertain legal status

There is some lack of clarity with regard to the enforceability of CC licences – a licence must satisfy local law and its validity will vary according to the legal jurisdiction by which it is tested. There is also some uncertainty about the legality of using CC licences in the context of authenticated or restricted access services.

Modification

The consequence of permitting others to use materials within the terms of the CC licence is that they will be able to copy, use and adapt the work. Risks arise that the work might be substantially modified in ways that the creator or licensor feels would undermine the work's integrity. This leads to a stark choice – permit no reuse or agree to unlimited reuse.

'Commercial' or 'non-commercial'

Another issue with CC licences is whether a resource can be used for 'commercial' or 'non-commercial' purposes. Unfortunately, the licence itself does not clearly distinguish the difference. This will have ramifications for FE and HE institutions providing access to content as well as using third party content.

Irrevocability

The irrevocability of the CC licences means that the CC licences may be withdrawn but the withdrawal only affects the resource after the date of withdrawal. There are a number of scenarios where rights owners would wish initially to make available a resource on the basis of a CC licence but subsequently insist that all copies are licensed under a different licensing regime.

Data and Databases

Data, as well as the Database Right are not explicitly covered in the CC licence, which might cut off a whole raft of resources to this form of licensing.

by staff this might go some way to resolving these issues. Uncertainty can largely be avoided by the institution having an intellectual property policy, which provides clarification with regard to the ownership of staff-produced work.

Where staff-produced work involves collaboration with commercial partners it is likely that agreements will have been reached in advance with the commercial partner with regard to the ownership of the intellectual property rights created as a result of this work. This may restrict what sharing can subsequently be done by means of CC licences. Materials that are expected to generate commercial gain are unlikely to be suitable for Creative Commons licensing. Equally, because some Creative Commons licensed material may already be restricted to non-commercial use it is necessary to ensure that materials to be used for commercial activities are cleared for commercial use.

Unpaid content creation in the academic world is often ignored in debates on creativity, and the requirement of attribution, which the CC licences introduce, may have the effect of providing suitable acknowledgment of this level of creativity.

Funding bodies such as JISC usually insist that funded work is Open Access, and the CC licences offer a way of complying with such a requirement.

The licences reflect a different spirit to many other forms of licences. They allow minimal levels of control over freedoms to use copyright works, rather than allowing limited permissions. This fits well with the general ethical and philosophical stance of the academic community, and is a significant reason why Creative Commons has penetrated the sector.

Developers and Managers of e-Learning Content

One of the main attractions of CC licences is simplicity. The ease with which they can be placed on images, for example, will help people who create learning materials.

Although Creative Commons may be suitable as a first-line protection for areas of an e-learning package, this may not be the case where commercial considerations and third-party rights issues are present.

Using Creative Commons Licensed Materials

When someone who is developing learning content wants to incorporate material that has been licensed under Creative Commons into their own materials it is essential that the reuse that is anticipated complies with the terms of the licence. If it is expected that these materials will be put to non-Creative Commons licensed use it may be appropriate to use another form of licence arrangement for the materials.

Using Infringing Material

A CC licence cannot make infringing material lawful. If a section of material is included in Creative Commons licensed work and there was no licence or other permission to use it in the first

place, then this may be a breach of copyright. The CC licence is invalid with respect to the infringing elements of the licensed work and any additional use of the infringing elements is a further breach of copyright.

Conclusion

Creative Commons and similar licensing frameworks are a significant development and have valuable application in FE and HE in fulfilling the need for wide and unobstructed access to research outputs and teaching materials as well as a flexible and enabling approach to use and reuse of outputs and materials.

It is recommended that institutions and projects should evaluate the use of CC licences carefully on a case-by-case basis, and should not assume that it is automatically the right or wrong solution. At the operational level those who are using the licences need to understand copyright issues and rights management. Getting the correct version of the licence for the particular material is important and the way ahead, it is suggested, is to experiment through practical usage, while closely monitoring the outcomes and the risks that arise along the way.

At a strategic level, committing to the irrevocable terms of CC licences raises issues of broader access and commercial goals for institutions. The use of CC licences should be a policy decision and should form part of the overall intellectual property policy of FE and HE institutions where the full implications are examined and understood.

Further Reading

The Common Information Environment and Creative Commons: Final Report to the Common Information Environment Members of a study on the applicability of Creative Commons Licences
www.intrallect.com/cie-study

Creative Commons Licences in Higher and Further Education: Do We Care?
www.ariadne.ac.uk/issue49/korn-oppenheim

Intellectual Property Rights in e-Learning Programmes: Good practice Guidance for Senior Managers (July 2006)
www.hefce.ac.uk/pubs/hefce/2006/06_20

Snapshot Study on the Use of Open Content Licences in the UK Cultural Heritage Sector
www.eduserv.org.uk/foundation/studies/cc2007

JISC Digital Media (formerly TASI) Online Image Tutorial
www.jiscdigitalmedia.ac.uk

TrustDR: Trust in Digital Repositories
<http://trustdr.ulster.ac.uk>

Web2Rights
<http://web2rights.org.uk>